

Supreme Court, U. S.
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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 1975

No. 75-823

RAYMOND BELCHER,
Petitioner,

v.

CASEY D. STENGEL, et al.,
Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit**

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Pursuant to Rule 40 of the Rules of the Supreme Court, Respondents state that they are dissatisfied with the statement of the case presented by Petitioner because it is not accurately expressed in the terms and circumstances of this case for at least three reasons:

1. The alleged question inaccurately assumes that the sole basis for the trial court's decision and verdict, and the appellate court's affirmance is the regulation requiring police officers to carry guns at all practical times.

2. The alleged question inaccurately assumes that the trial court's decisions and verdict, and the appellate court affirmance make a determination that any use of a gun that an officer was required to carry at all practical times was necessarily an act "under color of law".

3. The alleged question inaccurately assumes that the defendant officer was engaged in private conduct which is contrary to a finding of fact implicit in the jury verdict under the

charge of the District Court, and which is also contrary to the weight of the evidence and the Sixth Court opinion.

The reasons just given will be discussed in more detail in the argument section of the brief.

Respondents believe that the question thus inaccurately stated does, perhaps, include some subsidiary questions which are fairly comprised in an accurate statement of this record which the court might care to consider on the whole record in lieu of a possible finding that the writ of certiorari was improvidently granted.

Based on a complete and accurate review of the lower courts' proceedings, the following could be considered by this court as subsidiary questions pursuant to Court Rule 40 1(d).

1. Testimony and conclusions by a city police chief and a city safety director given after complete review of every investigative report prepared following a shooting incident, to the effect that at all times the officer involved acted in the line of duty when two men were killed, and one shot in the back and

paralyzed for life, from shots at close range from the officer's gun is sufficient evidence for a court to determine as a matter of law that the officer was "acting under color of law" or at least sufficient evidence to require submission of the color of law issue to a jury.

2. The filing of a claim for and the receipt of workmen's compensation by a police officer for activities on the ground that he was "in line of duty under circumstances relating to police duties" in which this police officer shot at close range and killed two men and shot another in the back who became paralyzed for life using a gun he was required to carry at all practical times pursuant to city police regulations is sufficient evidence for a court to determine as a matter of law that the officer was "acting under color of law" or at least provided sufficient evidence to require submission of the "color of law issue" to a jury.

3. The fact that petitioner police officer was represented throughout the trial and appeal by a city attorney whose authority was derived from a city charter provision describing his powers and duties to "be the legal adviser of and attorney and counsel for the city, and for

all officers and departments thereof in matters relating to their official duties" was a significant circumstance that the District Court and Appellate Court could consider regarding the issue of "color of law", which such defense counsel presented intermittently as a defense from the pleading stage through the appellate proceedings.

4. The fact that a police officer shooting at very close range killed two men and permanently paralyzed a third by a shot in the back with a gun he was required to carry at all practical times pursuant to police regulations, did not identify himself as a police officer or actually make a formal arrest, does not establish that he was not acting "under color of law" where there was substantial evidence that he commenced to quell a disturbance among other patrons who were strangers to him and unarmed in a public cafe using chemical mace issued to him by the city police department, where the officer admitted he had in mind the arrest of at least two men -(App. 173), and that he intended to stop the disturbance among strangers with the mace -(App. 185-187), which officer chased one victim outside the front door of the cafe and slugged him in the face with the gun

-(App. 176), particularly where a police regulation of the city required officers technically off duty to take action in any police or criminal activity twenty-four hours per day -(App. 76-77).

5. Where all causes of action in a complaint were tried together without objection opinions of a police chief and a safety director given after review of all investigative reports and statement of the participating officer to the effect that the officer acted in line of duty during the incident related to all claims in the complaint arising from the incident.

6. Where a vast volume of evidence in exhibits, examination and cross-examination of witnesses, opinion of a police chief and city safety director given after a review of all investigative reports and statements established action in "line of duty" in an incident were admitted without objection, and the police officer's counsel further agreed in open court that the police officer was acting under color of law -(App. 199), and argued the same conclusion to a jury -(Record 741 and 742), the police officer will not, thereafter, following

an unfavorable jury verdict, be allowed to object to the jury verdict on the ground that it implicitly determined he was acting "under color of law".

STATEMENT OF THE CASE

In the United States Court of Appeals for the Sixth Circuit, appellees who are respondents here presented a statement of the case which was divided into three parts as follows:

1. Simple Framework of Undisputed Facts
2. Stengel's Version of the Case
3. Inaccuracies in Appellant's Statement of The Case (13 listed)

In that court Belcher's counsel did not even file a reply brief or, thereafter, dispute appellees' statement or the listing of inaccuracies in Belcher's statement of the case. The Sixth Circuit, thereafter, in its opinion accepted the facts essentially as stated by appellees there who are respondents here.

In this Court petitioner has again presented an inaccurate, distorted version, although the inaccuracies and omissions here are somewhat different and, perhaps, more devious.

Therefore, respondents' statement of the case here will repeat exactly what was used in the Appellate Court in the first two sections with references to the appendix rather than the trial record where possible. Next, respondents will list the new inaccuracies, distortions and omissions in petitioner's statement of the case in this court.

SIMPLE FRAMEWORK OF UNDISPUTED FACTS

1. Plaintiff Stengel and two plaintiff decedents entered a neighborhood tavern in the outskirts of the Ohio State University area at about one a.m. in the morning on March 1, 1971; and Stengel and one of his companions began playing a bowling game on the premises with Mr. and Mrs. Kyle Morgan who had been in the tavern continuously from about 3:00 p.m., February 28, 1971.

2. Within about one-half hour, appellant, Raymond L. Belcher, an off duty, married, out-of-uniform Columbus policeman arrived at the tavern with a girlfriend. Belcher and his girlfriend sat with the barmaid of the establishment and her husband, Mr. and Mrs. Comston, in the second booth from the front door. Belcher had one drink of hard liquor and started on the second. Belcher was carrying a gun pursuant to City of Columbus police regulations. See pre-trial stipulation of uncontroverted facts No. 2.

3. Joint Exhibit 78 is an agreed scale drawing of the tavern and shows the tavern

room to have an interior width of 16 feet 10 inches and a depth of 54 feet 6 inches, and the exhibit discloses that the bowling machine area was approximately 20 to 25 feet from the westerly side of the booth where Belcher was sitting.

4. An argument developed between Noe and Mrs. Morgan about whether the loser would buy beer or hard liquor and Mrs. Morgan slapped or slapped at Noe. This minor happening quickly developed into the tragedy which is now before the Court. Except for Stengel's version which has always been consistent, there is little testimony of any witnesses that is not controverted in whole or in part by some other witness or by the same witness telling different stories different times about the developments, but there are a few basic facts and results that are not controverted as follows:

5. Plaintiff, Stengel, and plaintiff decedents were not armed, used no weapons and none were found on them, although there is conflicting evidence about them stomping and kicking with their feet.

6. Defendant, Raymond L. Belcher, used a chemical mace issued to him by the Columbus Police Department and quickly thereafter shot Ruff in the chest, into the heart, from a distance of 12 to 20 inches, shot Stengel in the back from a distance of 6 to 10 inches, and shot Noe in the chest and through the heart from a distance of 6 inches. The shots were from a weapon which Belcher was required to carry when off duty by regulation of the Columbus Police Department; and the distances just mentioned were determined by ballistic tests of the gun using the clothing of the

persons shot. These were Columbus Police Department tests.

7. The shooting resulted in the deaths of Robert D. Ruff and Michael J. D. Noe and permanent injuries to plaintiff Casey D. Stengel. (Pre-trial signed stipulation of uncontroverted facts No. 4.)

8. There is no evidence that Belcher ever identified himself as a Columbus Police officer. Bonnie Lohman, Belcher's girlfriend, testified:

"He got up with the tear gas and went to spray Noe." -(App. 127) The tear gas used was issued to Belcher by the Columbus Police Department. (App. 177) Belcher testified that after shooting inside the tavern he chased Noe out the front door to keep him from getting away, and that he struggled violently with Noe and slugged him in the face with his gun. (App. 188)

9. The first officer on the scene after the shooting testified that Belcher:

"appeared to have been hassled -- his face was red." (R. 295)

10. Twenty or thirty minutes after the incident Belcher was taken to a hospital, x-rayed and examined and released in good condition in about an hour. Other than the three men who were shot and Belcher, nobody in the tavern received any medical attention following the incident.

11. Microscopic examination of the shoes of the three men who were shot showed no traces of blood or hair, except Noe's shoes,

which showed traces of blood of a type the same as Stengel's, and he passed by the area of Stengel's body after Stengel had been shot and was lying on the floor. This blood was also Noe's own blood type. Noe was fatally shot and his body was found on the sidewalk outside -- fourteen feet from the exit. Belcher, also, had the same blood type.

12. Joint Exhibits 24 and 42 pages A through J are Belcher's Workmen's Compensation information and establish that Columbus recognized the claim as one in the course of employment, by the following language:

"Although this officer was 'off duty' he was in line of duty under circumstances relating to police duties."

These joint exhibits also show under Belcher's signature only a claim for bruises, abrasions and contusions on chest, face, and neck a day or two after the incident. This Court should note that more than a year later after this suit was filed a claim for back trouble from the incident appears for the first time. Also, the testimony of Police Chief Joseph admits that Belcher acted under authority of police regulations requiring him to carry a gun and take action in any type of police or criminal activity in connection with any disturbance. -(App. 76 and 77)

STENGEL'S VERSION OF THE CASE

1. Appellee, Casey Stengel, testified at length regarding the facts of the incident. His testimony is clear, sensible, consistent with the physical facts and not shaken to any degree by cross-examination about the

incident. (App. 62-63) It would appear from the result that these are substantially the facts that the jury accepted rather than the mass of contradictions and exaggerations of the defense witnesses which in many instances simply don't make sense. A summary of Stengel's testimony as shown in App. 44 through 49, is that he was sitting at the bar and had been talking to his Uncle Robert Ruff. He heard the disturbance behind him and as he turned, he saw that his uncle, who in the meantime had gotten up, was restraining Agnes Morgan against the piano. He saw a stranger, later determined to be Raymond Belcher, who was jumping on his uncle from the rear. Momentarily, before or as he was turning, Stengel detected a faint odor of chemical mace already in the small tavern.

2. At this point Stengel separated the stranger who had attacked his uncle from the rear and pulled him down to the floor during which time the stranger began spraying chemical mace directly at him. With the stranger on the floor with his hand extended up in the air spraying chemical mace, Stengel kicked at the hand a couple of times and the discharge from the mace stopped. Next, Stengel was aware that his uncle was standing over the stranger who had intervened in the disturbance. As he turned around to see what was happening back at the piano and bowling machine area, he heard two shots, the second of which entered the right side of his back above the belt and hit his spine causing immediate paralysis below the point where the bullet hit the spine.

3. The sum of Stengel's testimony is that he only tried to separate the parties already involved in the disturbance, defend his

uncle, Robert Ruff, and protect himself from chemical mace which was being discharged directly at his face from close range. He, also, described Belcher as jumping up immediately after the shooting and chasing somebody out the front door.

4. Stengel's testimony is consistent with the physical findings and scientific tests, and the fact of no serious or consequential injuries to Belcher. It is, also, consistent with common sense as there is absolutely no evidence from anybody that would give Stengel any motive, means, opportunity, or desire to assault Belcher with intent to kill. This was the preposterous charge filed against Stengel within a few hours and at a time when he was still having the bullet removed from his back or recovering therefrom in a recovery room.

INACCURACIES OF PETITIONER'S STATEMENT
OF THE CASE IN THE SUPREME COURT OF
UNITED STATES

1. On page three in the last paragraph and on the top of page 4 of his brief petitioner omits mentioning the following specific allegations in the complaint:

"During all times herein mentioned the City of Columbus by police regulation ordered off-duty policemen to carry arms at all times based on the theory that the police officers and police chief are on duty 24 hours per day.

"During all times mentioned herein defendants Belcher -... were duly appointed, qualified and acting police officers...and were agents of said city acting or purporting to act in the course of their employment, and engaged or purported to be engaged in the performance of their duties as police officers...and acting pursuant to orders, directives and regulations of said Police Department and orders and directives from defendant, Dwight Joseph, Police Chief of the City of Columbus...."

"All the conduct of all the defendants in connection with the facts alleged in this complaint has been ratified and condoned by defendant, The City of Columbus, through acts and conduct of its Chief of Police, Dwight Joseph, and other duly authorized supervisory personnel."

2. In the second paragraph on page 6 of his brief petitioner states there is no dispute that no time did Belcher attempt to personally effect an arrest, either as a police officer or as a private citizen.

* The complaint does not allege such attempt, but evidence did develop at trial to that effect.

At App. 173 Belcher testified:

"At that point I realized that I could not let this scene continue any longer, and I made up my mind that I was absolutely one way or another going to arrest all three men -- correction, at least two men. Mr. Stengel at

this point hadn't gotten involved in anything at all."

At App. 187 Belcher admitted to the following statement made at preliminary hearing:

"At that time I stood up, attempted to spray Michael Noe with chemical mace that I had. The tear gas didn't seem to work very much. Instead of coming out in a liquid stream, it came out in a gas and just generally sprayed everybody there. That is all the action I got into. All I wanted to do was stop the fight at that point."

At App. 176 - Belcher testified:

"Two men fell to the floor, one man the young man I know as Michael Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face."

3. On page 6 of his brief petitioner's statement is that he decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk outside. This conflicts directly with the statement at App. 187 just given which discrepancies petitioner does not take into account in his statement of the case.

4. On page 6 of his brief petitioner does

not take into account conflicts in testimony when he states -

"as he arose from his seat he told Bonnie Lohman to leave the premises should more trouble occur."

As shown at (App. 154) witness Comston sitting in the same booth did not hear anything said by Belcher to his girlfriend at that time. Yet, Lohman - Belcher's twenty year old girlfriend - claims -(App. 121) that Ray -

"said something about calling the police, and me to get the hell out of there" -

This discrepancy is significant as it supports the version that Belcher intervened in the scuffle rather than attempted to go to make a 'phone call and raises questions as to how and why the girlfriend was the only witness who was not at the scene when other police arrived.

5. On page 7 of petitioner's brief it is stated:

"Once the gas was emitting Belcher did indicate an intent to spray respondent Noe who was now coming toward him."

This statement does not take into account the testimony - App. 123 - when Bonnie Lohman testified:

Q. What happened next?

A. Noe stopped kicking Morgan and started in that direction. Stengel got shot.

Q. Started in the direction of Officer Belcher?

A. Yes.

Q. Then Stengel got shot?

A. Yes.

The foregoing omitted testimony is significant because it verifies Stengel's version that Noe was never an aggressor at anytime as far as Belcher was concerned prior to the shooting.

6. In petitioner's brief, page 8, at the first series of asterisks the following crucial admissions by Belcher are omitted which followed immediately after the language that ended at these first asterisks:

"Two men fell to the floor, one man, the young man known as Mike Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face."

7. On page 9 of the brief petitioner states:

"Belcher's testimony of his involvement in the matter was corroborated by all other eye-witnesses with the exception of Stengel."

This statement fails to take into account the many inconsistencies of the testimony of witnesses with each other, although in a general way, there is partial corroboration of Belcher's testimony by some of the witnesses, and, particularly, it fails to take into account the direct conflict with Belcher's story shown by Joint Exhibit 26 - App. 242 - which is the initial statement given by witness, James Comston, a few hours after the incident. Comston was sitting in the booth facing east beside Belcher, and had the best ringside seat for the whole incident, and his statement, in part, includes the following -(App. 244):

"Q. Did you see anyone kick Ray? With their feet or stomp him. A. No, I didn't.

Q. Did you see a man with a red-polka dot shirt? A. Yes.

Q. Was this man attacking Ray? A. Yes, he was one of them.

Q. Just exactly how was he attacking him?
A. He, Ray, had one of the guys, the one in the polka-dot, he jumped Ray, on there to help his buddy out."

It should be noted that this ringside spectator in his first statement after the incident corroborated Stengel's version, although his testimony at trial was entirely different.

8. Near the bottom of page 9 of petitioner's

brief it is stated:

"Stengel's description as to Belcher's involvement was in direct conflict with all other eye witnesses."

For the reasons shown in No. 7 just given, this is not true. In addition, there is much of Stengel's testimony which is not at all in conflict with Belcher's statement such as, the original slapping incident in which Stengel was not involved, the tear gas in Stengel's face, Belcher jumping up after firing the gun and chasing Noe out the front door, and numerous other details.

9. On page ten of petitioner's brief near the top of the page he states the opinion of the police chief and the safety director were admitted in evidence to establish a conspiracy. This is grossly inaccurate, as the various claims in the complaint were not tried separately, and the opinions were admitted without objection, and tended to prove activity under color of law as to all claims in the complaint, and had no special relationship to the conspiracy claim.

10. On page ten near the bottom of the first long paragraph, there is an inaccurate summary

of the Hughes' letter to Belcher when the summary of the letter is compared with the actual letter - joint Exhibit 43 - which exhibit states only Hughes' opinions. This discrepancy is only significant to the extent that the record does not actually disclose any separate opinion of the Firearms Board of Inquiry, within the Hughes' letter, and Hughes did not participate as a member of that Board of Inquiry.

11. At the bottom of page ten and the top of page eleven of petitioner's brief a portion of the Court's charge is pulled from context which has the misleading effect of de-emphasizing language in the charge which immediately precedes, and following the excerpts. The full context of the District Court's charge to the jury as it relates to the color of law issue is given in Appendix 207 through 216. Also, in connection with the charge petitioner fails to note that no exception was taken to the court's charge in any manner as it concerned the color of law issue.

CONCLUSION REGARDING
STATEMENT OF THE CASE

Respondents believe petitioner has degraded

the United States Court of Appeals for the Sixth Circuit and The Supreme Court of the United States by statements summarizing this case which are inaccurate, incomplete and unfair. Respondents may have failed in their duty to this court by not opposing the petition for a writ of certiorari with a more detailed response, but it is believed that based on the details thus far outlined in this brief, this court now has additional information which more clearly explains why petitioner's alleged question presented is not truly within the evidence presented or is it related accurately to any rulings of law which were pronounced either in the District Court, or in the Sixth Circuit opinion.

FACTS MAKING THIS CASE
UNUSUAL OR UNIQUE

Although respondents believe the actions of the District Court and the Sixth Circuit are well within the established and settled law announced by this court in U. S. v. Classic (1941), Screws v. U. S. (1943), Williams v. U. S. (1951), and Monroe v. Pape (1961), there are certain facts of this case which are unique or at least somewhat unusual in the annals of civil rights litigation in federal courts as

follows:

1. The vast majority of civil rights plaintiffs have been black or persons aiding black people in asserting their rights. The involvement here is with white Americans without any minority status or special status as prisoners or protesting students.
2. The two deaths and one terrible injury exceed by far the damages to any plaintiff or group of plaintiffs by the act of one person in any reported case.
3. Plaintiffs here were asserting no special constitutional right in connection with the incident such as free speech, freedom of assemblage, equal protection of the laws, etc.
4. The jury determination demonstrates a clear understanding of the measure of damages as to each plaintiff pursuant to the charge of the court, and the verdict implicitly determines by reason of the punitive damage finding that the shootings were malicious, wanton or oppressive. The charge of the court regarding punitive damages was correct, and no objections to the charge relative to punitive damages were made.
5. Principal trial counsel for the defendants was also himself a defendant, and an important witness called to testify on cross-examination by the plaintiffs by reason of his former position as city safety director at the time of the shooting incident, and his activities regarding this incident prior to the filing of

the civil rights case.

6. A grossly exaggerated criminal charge of assault with intent to kill was filed against Stengel who was unarmed within seven or eight hours after the shooting incident before the police investigation was completed or results of scientific tests by the crime laboratory were complete, and before opportunity for Stengel to give a statement, as he was in the hospital recovering from the removal of the bullet from his back when the charges were filed.
7. The exaggerated criminal charge against Stengel was not tried until almost two years after the incident, but the 1983 claim was filed one day before the one year statute of limitations covering assault claims in Ohio.
8. Defendants in the federal case opposed all discovery procedures for almost a year on the ground of necessity because of an ongoing criminal prosecution. The detective who prepared the county prosecutor's summary did not notify the prosecutor that two sets of statements were taken. Therefore, the crucial testimony of the closest witness which corroborates Stengel's version, as shown in the last part of Joint Exhibit 26 was unavailable in the criminal case. In the record page 281 Detective Ewell Young testified:

Q. "Did you tell the prosecutor that statements were taken earlier in the morning, and then they were taken again?"

A. "No sir, I did not."

9. The defense trial tactics and argument sought to influence the jury and the trial judge by admissions that the police officer acted in line of duty thus abandoning any reliance on a defense originally pled that the police officer was not acting "under color of law". After the trial judge, nevertheless, cautiously submitted the issue of "color of law" to the jury because of certain factual uncertainties in the evidence with a charge that was not objected to and implicit in the jury verdict, is a finding of action "under color of law", petitioner is trying to revive the issue in appellate proceedings on the theory that all the police officer's activity was private conduct.

ARGUMENT

I THE REASONS WHY THE QUESTION PETITIONER SEEKS TO PRESENT IS INACCURATELY EXPRESSED IN THE TERMS AND CIRCUMSTANCES OF THIS CASE.

1. The results below are on a much broader base than the gun carrying regulation because of the following:

- a. Petitioner used police issued chemical mace to attempt to quell a minor disturbance between unarmed strangers to him in a public tavern.
- b. Under police regulations and custom, the

police officer was expected to take action in any kind of a breach of the peace, although not necessarily with the gun or any other particular weapon or method.

- c. After the shooting of at least two men the officer wrestled with and tried to keep a third man from escaping.
- d. The officer applied for and received workmen's compensation because he was "acting in line of duty" in the incident.
- e. The police officer's two highest superiors, the police chief and the city safety director, reviewed all investigative reports, and the officers' statements, and found his action to be in line of duty without sole reliance on the gun carrying regulation.
- f. There was substantial evidence from the parts of the officer's own statements that he intended to make arrests which was not solely related to the gun carrying regulation.

In summary for this subsection it can be stated that the gun carrying regulation is an important part of both the "color of law" evidence, and the use of excessive force which establishes the constitutional violation as well, but it is still a relatively small part of what the Sixth Circuit opinion described as overwhelming evidence.

2. There is nothing in this case that suggests or implies that "any use of the gun" the officer was required to carry at all practical times would be action "under color of law". The facts of this case are clearly not so broad as to encompass "any use of the gun," but merely relate to the facts and evidence in this record, and there is no statement any of the judges in the District Court or Appellate Court that justifies such an exaggerated and maudlin presentation to this court.

3. The evidence does not justify the assumption that the officer was engaged in "private conduct" in the incident because in addition to the points listed a through f under paragraph 1 preceeding, also -

- a. Failure to identify himself as a police officer did not necessarily make the conduct private, but rather as the Circuit Court opinion stated -

"as a police officer he used poor judgment in this regard."

- b. The interaction occurred in a public tavern between strangers.
- c. There is a finding of fact implicit in the jury verdict after the charge of the court that petitioner was not engaged in

private conduct -(App. 209 - 210 - Portions of court's charge)

- d. The points listed under paragraph 1 - a. through f. preceding and a through c immediately above - support the Sixth Circuit's statement near the end of the opinion as follows:

"concerning liability the verdict is supported by overwhelming evidence."

At that point the Sixth Circuit opinion was discussing the whole record, including the weakness of the self defense argument and the justification of the award of punitive damages.

II THE DETERMINATIONS BY THE SIXTH CIRCUIT AND THE DISTRICT COURT THAT PETITIONER HAD ACTED UNDER COLOR OF LAW DO NOT, IN FACT, CONFLICT IN PRINCIPLE WITH ANY DECISIONS OF THE SUPREME COURT AND LOWER FEDERAL COURTS

Initially, petitioners have omitted vital parts of the Complaint in attacking the pleadings with a Motion to Dismiss. Further, in this court they have failed to discuss what the record in full discloses. On May 23rd, 1972 after James J. Hughes, Jr. had become City Attorney for Columbus, and before Motion to Dismiss the Complaint was filed, depositions in this case were taken of both Stengel and Petitioner Belcher. Belcher's deposition admitted that he had

applied for for and received Workmen's Compensation out of the incident involved, and also used words such as "apprehend" in relation to chasing Noe out the front door, and other indicia that he was acting in line of duty. Based on this deposition, and before a court ruling on the Motion to Dismiss respondents filed a Motion for Partial Summary judgment asking the District Court to determine as a matter of law that Belcher was acting under color of law.

This was the posture of the case at the pleading stage. Sometime thereafter, and simultaneously the court overruled City's Motion to Dismiss, and, likewise, overruled the Motion for Partial Summary Judgment leaving more detailed facts for development in the course of trial.

In view of all the allegations in the Complaint, many of which petitioner has, apparently, deliberately omitted in order to sift out and emphasize other statements of the occurrence from the Complaint, the trial court clearly followed settled law in overruling the Motion to Dismiss.

Likewise, the trial court very cautiously declined to charge the jury that the actions

were as a matter of law under color of law, apparently, because some of the facts in the occurrence were disputed, which facts the jury would resolve.

The Appellate Court, in view of statements of counsel and the record, stated that it agreed with respondent's position at the end of the evidence, that the trial court could have determined as a matter of law that petitioner was acting under color of law, but, specifically withheld any criticism of the more cautious approach of the District Court.

These rulings fit together logically when one considers that the Appellate Court had the opportunity for an overview of the final trial tactics of petitioner, including the argument to the jury by counsel emphasizing Belcher's activities and duties as a police officer.

The basic facts of this case are shocking, and the amount of the verdict is startling because of two deaths and one terrible maiming. A verdict of \$831,000 far exceeds anything on record in any federal civil rights case which we found reported in this court or any lower federal court. The Sixth Circuit opinion properly

stated: "the verdict is supported by overwhelming evidence". The extent of damages in this case does not, however, cause conflicts with settled legal decisions of this court.

Also, the unusual fact that the police officer was out of uniform and not within his regular tour of duty, does not cause a conflict with other decisions when the full facts and circumstances of the incident are carefully taken into account.

Petitioner has made some broad emotional claims about this case broadening the application of the statute and creating implications for its unwarranted extension, but he has not backed this claim with any logical or accurate or specific reasoning.

It is respectfully urged that on the full facts here the actions by the lower courts are well within the facts, logic and reasoning of the leading cases - United States v. Classic, 313 U.S. 299 (1941), Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951), and Monroe v. Pape, 365 U.S. 167 (1961); Griffin v. Maryland, 378 U.S. 130 (1964).

In the case before the court the jury weighed the evidence and the disputed facts and returned a verdict that indicated the careful charge of the court was fully understood, as the awards to each plaintiff were consistent with the evidence and the charge. Further, the jury made an award of punitive damages in an equal amount to each plaintiff, which finding pursuant to the evidence and the court's charge, implicitly means that the shootings were - "maliciously, or wantonly or oppressively done". (Charge of Court - 778 Record)

Concerning this determination, the Sixth Circuit opinion stated with precise reference to the evidence:

"Concerning liability, the verdict is supported by the overwhelming evidence. The minor injuries consisting of bruises and cuts received by Belcher on his face which did not require hospitalization do not support his claim of self defense or justify his use of excessive force in killing two young men and permanently maiming a third. Concerning punitive damages, plaintiffs' counsel moved orally to amend the complaint to ask for punitive damages. Fed. R. Civ. Pro. 15(b). As with other issues which Belcher has raised, he did not object to the Court's instruction concerning punitive damages. Our observations concerning this

failure, supra., are likewise applicable here. Stengel's testimony, in conjunction with the fact that the bullets were fired from close range without warning into vital parts of the victims' bodies, supports the award of punitive damages."⁴

4 - Footnote:

Punitive damages may be recovered in actions under 42 U.S.C. Sec. 1983. McDaniel v. Carroll, 457 F. 2d 968 (6th Cir. 1972), cert. denied, 409 U.S. 1106, 93 S. Ct. 897, 34 L Ed 2d 687 (1973); Basista v. Weir, 340 F. 2d, 74, 87 (3rd Cir. 1965).

In the opinion of the Court in Monroe v. Pape, 365 U. S. 167, at pages 184 and 185 a principle is stated that is clearly and particularly applicable to this case because the petitioner here is not able to specifically identify the claimed exigencies by reference to accurate facts or logical or sensible conclusions from the accurate facts.

"The construction given Sec. 20 (18 U.S.C. Sec. 242) in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to Mahnich v. Southern S. S. Co., 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what

preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of Sec. 20 (18 U. S. C. Sec. 242) to meet the exigencies of each case coming before us." Id., 112-113.

We adhered to that view in Williams v. United States, supra, 99."

III PETITIONER'S ARGUMENT FOR ACTION
BY THIS COURT IS UNSOUND.

Respondents note that many of petitioner's arguments are based on the false and inaccurate premises from his statement of the case.

For example, on page 18 petitioner states:

"A careful examination of the evidence at trial from those who witnessed the incident (including the petitioner and Respondent Stengel) produced nothing that would indicate

that petitioner had embarked upon the exercise of his official duties."

This statement ignores, statements by Belcher about intent to arrest at least two, Belcher chasing Noe out the door to stop his escape as verified by Stengel, and also the prior statement by Bonnie Lohman that Belcher took out his mace and "went to spray Noe."

Also, the second full paragraph of the argument on page 18 petitioner argues that the complaint "merely alleges aggressive involvement in an argument" which as shown earlier is false.

Another example of arguments on false premise is on page 20 of petitioner's arguments when they state:

"Opinions offered by persons who did not witness Petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to displace a Federal Court's judgment as to that jurisdictional issue. To allow such displacement would stray from the judicial requirement of a 'careful sifting of the facts and circumstances of each particular case.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)."

Although respondents believe that state

involvement here is so obvious from the full record that the requirement set up in the Burton case about sifting the facts does not really come into play, respondents are sure that the judicial requirement of a "careful sifting of the facts and circumstances of each particular case" was not intended to mean what petitioner has done here by sifting out all the facts that are damaging to his position, and then twisting the interpretation of the remainder of the facts.

It is respectfully urged that the disputed facts have been resolved by a jury under a proper charge by the court, and petitioner is now engaged in sifting out from this court's attention many of the facts which sustain the jury verdict. The facts here are detailed and the distinctions between the versions are somewhat subtle, making 100% accurate reporting all the facts difficult, but there is still no justification for the extent of inaccuracy and distortion in petitioner's presentation which degrades the federal courts in what should be a "search for truth".

It is regrettable that such a lengthy statement of the case and such lengthy refer-

ences to factual inaccuracies seem to be required, and respondents will not attempt to cover each and every one as they feel many will be obvious to the court without re-reference to them in our argument.

In addition, regardless of the inaccuracy of the basis of these arguments, respondents have great difficulty following their logic.

On page nineteen of their brief petitioner dwells on an isolated statement in the Sixth Circuit opinion that the officer used poor judgment in not initially identifying himself as a police officer. This statement is not a conclusion that there was not a great deal more than poor judgment involved in the ultimate shooting, as the appellate court affirmatively commented later that the punitive damages awards were amply justified.

On page twenty-two petitioner seems to say that action taken pursuant to a duty under police regulations could be private action, and not under "color of law", but that the lower court actions make every act of self defense, disciplining the officer's children, driving a police cruiser home from work, etc., actions

under color of law, and that, therefore, as soon as a policeman is sworn in, his existence as a private citizen ends. Next, after these drastic and definite conclusions about the impact of the lower court's rulings, they say that the difference between private and public action is "blurred" by the lower court's rulings to an irretrievable point.

Finally, on page twenty-three of his brief petitioner seems to reach new heights of irrelevance and inconsistency by talking about tort remedies, burden on the judiciary, that the lower court rulings will tend to discourage, proper law enforcement, lessen protection for citizens, dampen vigorous law enforcement, or create a hesitancy to act and deprive the officers of a right to self defense in their private lives.

Petitioner does not explain exactly "how" the lower court rulings are going to produce all these consequences, but if the lower court rulings are so far reaching, the consequences would seem to be both good and bad.

Without intending to be flippant, but just to illustrate the argument if lower court's ruling are as potent as claimed, perhaps police

officers will be reminded not to discipline their children by shooting, will be reminded that at least when they use the gun they are required to carry, they may have the responsibilities of police officers, and, perhaps, they should hesitate before using it.

As near as respondents can follow petitioner's line of argument, he seems to be saying that, out-of-uniform, off their regular tour of duty, policemen should be given some sort of special exemption or immunity from the impact of 1983, or they will likely go on some sort of slow-down or strike.

Respondents see some different impacts caused by the rulings of the lower courts. Respondents do not read the recent decisions of this court such as *Rizzo v. Goode* - 1976, *Hicks v. Miranda*, 422 U.S. 332, 1975, *Imbler v. Pachtman* - 1976, and *Paul v. Davis* - 1976, as even a one inch retreat from the basic principles established in *U. S. v. Classic*, *Screws v. U. S.*, *Williams v. United States*, and *Monroe v. Pape*.

Respondents read the most recent decisions of the court in this general area to suggest -(1.) a limitation of District Court action in

activities which would engulf the court in detailed supervision of the daily functions of a police department, *Rizzo v. Goode*, 1976, and, (2.) a limitation on the use of District Courts for damage actions where the injuries claimed are not clearly violation of rights protected by the Federal Constitution, *Paul, Chief of Police v. Davis*, 1976.

However, in view of the denial of complete immunity to the Governor of a State in *Scheuer v. Rhodes*, it seems unlikely that this court's decisions suggest some sort of a special immunity from the impact of 1983 for police who are out of uniform, which is the way respondents interpret petitioner's request here.

Respondents read the recent decisions of this court as an attempt to maintain the delicate balance between state and federal governments by strict interpretations of new fact situations regarding 1983, both in the "color of law" aspect, and the constitutional rights definition, but not a turnaround or reversal of settled law in this area.

Petitioner seems to be making a maudlin appeal to this court for relief based on what he

might have read about this court's trends in the newspapers rather than what the decisions seem to say after detailed study.

Again, without the intention of flippancy, respondents suggest that petitioner's brief exceeds his constitutional right of free speech, as he has marched a set of straw man inaccurate facts before this court alongside a series of straw man inaccurate, illogical arguments, and then lit a match and yelled "fire".

More formally stated, it is respectfully urged that much of petitioner's argument insofar as respondents can follow and understand, it appears to be a continuance of the "manufactured exaggerations and distortions" which have already been rejected by the jury, the trial judge, and the Sixth Circuit opinion.

The principal judgment here is in favor of a non-protesting, white war veteran, who after distinguished service, was ready to commence his education at Ohio State University when he was maimed for life by a wanton act by a policeman in connection with a minor breach of the peace which Stengel was trying to control. The two other young men whose lives were snuffed out

were ordinary young white citizens drinking beer on a week-end without intending to seriously harm anyone.

After full hearing before a jury and careful judicial scrutiny, the victims have won under Title 42, Section 1983, in two federal courts, and petitioner has advanced no legally sound or factually accurate reasons why the results should be disturbed.

Respondents felt that the writ of certiorari would not be granted, as the question petitioner advanced is not within the facts of the case, but in lieu of a subsequent determination that it was improvidently granted - the sub-questions listed in the first pages of our brief may have some importance as a possible method of reaffirming and explaining the settled law of *Monroe v. Pape* - which is fifteen years old.

The police forces of our cities should be again reminded that the U. S. Constitution is the supreme law of the land which will be enforced in federal courts where it is necessary. The whole record in this case discloses the continuing need for the doctrine established in *Monroe v. Pape* as described in Headnote 2:

"2. In enacting Sec. 1979, Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Pp. 174-187.

(a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp. 172-187.

(b) One of the purposes of this legislation was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp. 174-180."

In conclusion, it is respectfully urged that the lower courts have carefully followed long standing principles which control the full facts of this case, and a jury has resolved disputed issues of fact pursuant to a careful, fair and complete charge by the trial judge.

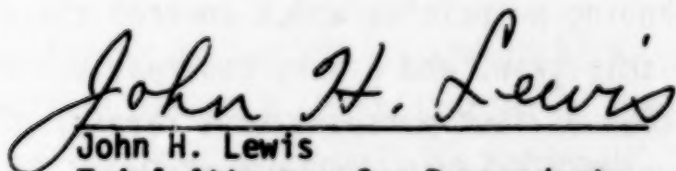
Petitioner's presentation here does violence to three long established principles and ideals of our court system which include: (1) "all

persons being equal in the eyes of the law";
(2) "a right to trial by a jury"; (3) Judicial
proceeding should be a "search for truth".

CONCLUSION

Petitioner has presented a statement of the case which is an inexcusably inaccurate summary of the "manufactured exaggerations and distortions" presented as a defense in the lower courts. The jury verdict is supported by "overwhelming evidence" regarding the color of law issue and all other factual and legal issues. Petitioner has advanced no sound reason for changing the settled law that circumscribes the true facts of this case. All the actions by the lower courts should be affirmed.

Respectfully submitted,



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